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No. 111

In the Supreme Court of the United States

OCTOBER TERM, 1947

HOMER C. PRICE, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the majority of the circuit court of appeals affirming the judgment of the district court and the dissenting opinions (R. 53–66) are reported at 161 F. 2d 705. The opinions on petitioner's motion for an order directing his production in court to argue his appeal (R. 44–52) are reported at 159 F. 2d 234.

JURISDICTION

The judgment of the circuit court of appeals denying petitioner's motion for an order directing

his personal appearance before the court to argue his appeal was entered January 6, 1947 (R. 43–44). The judgment affirming the order of the district court denying petitioner's application for a writ of habeas corpus was entered May 5, 1947 (R. 66). On February 25, 1947, Mr. Justice Reed extended to June 6, 1947, petitioner's time to file a petition for a writ of certiorari to review the order of January 6 (R. 67). The petition for a writ of certiorari was filed on June 4, 1947, and certiorari was granted on June 23, 1947 (R. 67). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a court may, on consideration of a fourth successive petition for a writ of habeas corpus, give controlling weight to the denial of the three earlier applications, where the earlier records show that the fourth petition in fact presents no new contentions.

2. Whether, assuming that the fourth petition did contain a new allegation, a court is warranted in denying that fourth petition because of an abusive use of process in the filing of successive petitions, where the fourth petition for the writ fails to show when knowledge of the newly alleged contention came to petitioner's knowledge, or why it was not previously raised.

3. Whether a prisoner who, without counsel, has appealed from the denial of a writ of habeas corpus, is entitled as of right to be brought before the appellate court to argue his appeal.

STATUTES INVOLVED

Section 262 of the Judicial Code (28 U. S. C. 377) provides in part:

> * * * The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 272 of the Judicial Code (28 U. S. C. 394) provides:

> In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.

R. S. 754 (28 U. S. C. 454) provides:

> Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or

authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

R. S. 755 (28 U. S. C. 455) provides:

> The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

R. S. 760 (28 U. S. C. 460) provides:

> The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

STATEMENT

On February 15, 1938, petitioner was indicted in the Eastern District of Michigan in four counts charging violation of the federal bank robbery statute, 12 U. S. C. 588b and 588c, by entering a federally insured bank with intent to rob, robbing the bank by putting an employee in fear, jeopardizing the lives of a bank employee and others by the use of a dangerous weapon,

and kidnapping a bank employee in the course of such offenses (R. 10–14).

Petitioner was arraigned on February 18, 1938, at which time he was represented by counsel; he waived the reading of the indictment and pleaded not guilty (144 F. 2d 260).

Petitioner was represented by counsel of his own choosing at the trial, which commenced on April 19, 1938, and concluded on April 29, 1938. On the latter date, the jury returned a verdict of guilty on all counts of the indictment. Petitioner was also represented by counsel when the trial court pronounced sentence on May 14, 1938, sentencing him generally to imprisonment for 65 years. (R. 15–17; 144 F. 2d 260.) Thereafter petitioner was duly confined in the United States Penitentiary at Alcatraz (R. 21).

A petition to mandamus the trial judge to enter a decision upon petitioner's application for an appeal was denied because "no application for appeal is pending before respondent or in the United States District Court for the Eastern District of Michigan." *Price* v. *Moinet*, 116 F. 2d 500 (C. C. A. 6), certiorari denied because filed out of time, 311 U. S. 703, rehearing denied, 311 U. S. 729.

Since his confinement, petitioner has on four separate occasions, of which the present proceeding is the latest, applied for a writ of habeas corpus. The scope of the issues here requires

that the issues in the earlier applications be set out in detail.

I. The first petition was filed in 1940, in the United States District Court for the Northern District of California. Petitioner sought release from confinement on the grounds that evidence adduced against him at his trial had been obtained in violation of the Fourth Amendment, and that the trial judge had improperly held insufficient an affidavit of prejudice filed against him. (R. 3–14, No. 1081, Oct. T. 1941.) The district court issued an order to show cause, return was made, and petitioner filed a "Motion to overrule Respondent's return and issue writ" (R. 84–91). Point V of petitioner's motion was as follows (R. 87):

> Because the respondent shows falsely on the affidavit by Assistant United States Attorney John W. Babcock, respondent's Exhibit 'A', where he states that there was no determination of any one in said office of the United States Attorney to have him convicted falsely. Petitioner calls the attention of this Honorable Court to the testimony of transcript of record at page 35 Second part. Recross examination of the one and only witness that the government produced to testify that there had been a crime committed as charged in indictment #24629. Petitioner's Exhibit 'A', testimony given by Fred T. Donner, and it will show just what methods was used to ob-

tain two different statements from this witness.

Attached to petitioner's motion as Exhibit F was the cross-examination of the witness Donner at petitioner's trial (R. 94–199). We set out below the two excerpts from that exhibit which are material here.

(a) Recross-examination of the witness Donner by Mr. Salowich, on behalf of the defendant Simunov, morning session, April 20, 1938 (R. 181–182):

Q. How many times have you talked with Mr. Babcock [Assistant U. S. Attorney] about this case?

A. Twice.

Q. When is the last time?

A. Last night.

Q. After you left the stand?

A. Yes, sir.

Q. Is your recollection any better today than it was yesterday?

A. My recollection was all right yesterday, only I was nervous.

Q. You are not nervous today?

A. Not so nervous as I was yesterday. I have never been in a court room before, on the witness stand.

(a) Recross-examination of the witness Donner by Mr. Payne, on behalf of the defendant Price (the present petitioner), afternoon session, April 20, 1938 (R. 194–196):

Q. Witness, perhaps I misunderstood your testimony this morning. Did I under-

stand you correctly to say that last night after you left here, you went up to the department of Justice, or the District Attorney's office, and you discussed your testimony? A. Yes, sir.

Q. And whom did you discuss it with?

A. With the District Attorney, and the assistant.

Q. And after that discussion, you remembered some things that you have testified to this morning?

A. I remembered them yesterday, but I just—I was nervous and forgot them.

Q. And did you remember at that time, in your description to me yesterday, of the man that was sitting in the car when you were first accosted, that you could not tell what type of a gun it was, you could only see the barrel? Do you remember telling me that, or do you not?

A. Yes, I think I did say that.

Q. What changed your mind, witness?

A. Nothing, only I gave more complete description perhaps today than I did yesterday.

Q. Well, yesterday you tried to give the jury a complete description of what you saw in the man's hand, who was seated in the car, didn't you?

A. I said yesterday that he had a gun, didn't I?

Q. Well, you remember being asked, witness, to describe the gun, and you were not able to at that time?

A. I described it just the same as I did now.

Q. Do you remember saying that you could only see a part of the barrel? A. I didn't say part of the barrel.

Q. Well, yesterday in your cross-examination, did you or did you not describe any more of the gun than you claim was in the man's hand?

The COURT. Which man?

Mr. PAYNE. Who was seated in the automobile, other than just the barrel of that gun.

The COURT. Which man?

Mr. PAYNE. The man who was seated within the automobile, your honor, at the time he was accosted.

The COURT. You mean before he got into the car?

Mr. PAYNE. Yes, sir.

The COURT. According to his claim, it was——

Mr. BABCOCK [Assistant U. S. Attorney]. Simunov.

Mr. PAYNE. The defendant Simunov.

The COURT. Yes.

Mr. PAYNE. That is whom I am speaking of.

Q. What was the question, please?

(Question read by the reporter as above recorded.)

A. I think I said I saw the gun, did I not?

Q. Well, my recollection and yours per-

haps do not agree on it, but the statements that you made yesterday were all true to the best of your recollection, were they not? A. Yes, sir.

Q. And your conversations last night after you left the court didn't assist you in giving any testimony, did they?

A. No, it did not, only that I had an opportunity, I wanted an opportunity to bring out something that I hadn't said.

Q. Did it refresh your recollection?

A. No, it just—there were just some things I didn't tell in my story, that is all.

Petitioner moved for the appointment of counsel (R. 17), and the pleadings in the habeas corpus proceeding being complete, counsel was duly appointed for him by the district court (R. 200). Thereafter, following argument and submission, the district court denied the application for a writ of habeas corpus and dismissed the petition (R. 201).

Petitioner then moved, *pro se*, for a rehearing, on the ground that the court-appointed attorney "blocked your petitioner from filing an amended petition to include additional points so they could be reviewed on appeal" (R. 213).

On appeal, petitioner still acting *pro se*, his fifth point was that he was denied a fair trial because the witness Donner changed his testimony after the District Attorney talked to him (R. 234). The opinion of the circuit court of appeals affirming the denial of relief considers

at length the points made in the petition for habeas corpus; it does not deal with any of the points first raised on appeal. *Price* v. *Johnston,* 125 F. 2d 806 (C. C. A. 9). Price then applied for certiorari, raising *inter alia* the point that Donner changed his testimony (Pet. 32); this Court denied the writ. *Price* v. *Johnston,* 316 U. S. 677, rehearing denied, 316 U. S. 712 (No. 1081, Oct. T. 1941).

II. Within four months after the final action by this Court on his first petition, petitioner on September 24, 1942, filed a second petition for a writ of habeas corpus (R. 4–22, No. 607, Oct. T. 1944). In the second petition he sought release on grounds earlier set forth, and also on two principal additional grounds, viz., that petitioner's counsel had been absent from the trial, and that petitioner had not had counsel at the preliminary hearing before the United States Commissioner.

The lawyer who had represented petitioner in connection with the first application was permitted to withdraw, and another lawyer was appointed by the district court to serve as counsel for petitioner (R. 24). This lawyer filed an amended petition for the writ (R. 25–48). The writ issued (R. 53, 56), there was a hearing at which petitioners' counsel was present (R. 58), a further amendment of the petition was allowed (R. 59–60), and testimony was taken, petitioner

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giving evidence on his own behalf (R. 63 *et seq.*). Neither in this second petition nor in his testimony did petitioner allege that false testimony had been knowingly used at his trial. On further redirect examination by his own counsel, Robert Ransom, Esq., petitioner testified as follows (R. 82–83):

> Q. Mr. Price, you originally wrote up this petition for a writ of habeas corpus. Are there any other facts substantiating your allegations that you would like to bring to the attention of the Court? A. There were three things that took place in the conversation between myself and Mr. Richmond during the time that I was held from the 5th of February to the 10th.
>
> Q. Have you testified to that? A. I have not yet.
>
> Q. Will you please tell us what took place? A. While I was under these threats that I told you that these agents made while holding me, I was taking Richmond at his word, and I told him that I had won $500 playing poker the night before when I got through work, and another incident I told him about some money that I had received from my grandmother's estate in West Virginia before her death, and all those matters were used against me at the trial; in fact they subpœnaed one witness from West Virginia who was administrator of my grandmother's estate, and when I told him these things I did

so because I was in fear of what he might do to my wife and children.

Mr. RANSOM. That is all.

Petitioner errs in stating (Pet. Br. 6, 16) that "the District Court excluded all evidence of what had occurred during the course of the trial." It admitted testimony relating to petitioner's contention that his counsel had been absent at the trial (R. 78–79; Resp. Exh. A). And the rulings excluding testimony proceeded on narrow grounds.

Thus, petitioner's counsel offered certain exhibits (R. 71) "to show that error was committed by the trial judge in allowing these papers to be admitted in evidence when they had been illegally taken from petitioner's private home without a search warrant," and the objection was sustained. Next, petitioner's counsel undertook to prove that the prosecution had put a prostitute on the stand (R. 71–72) "to show that a woman was put on the stand who testified that Mr. Price came to her home and placed a gun against her head and threatened to kill her, and I offer it for the purpose of showing that it was not relevant to the issues involved in the case, and that the Court committed error in overruling the objection by counsel to the admission of this evidence." A colloquy with the bench developed the circumstance that the alleged error occurred during the course of a trial in which petitioner was represented by counsel, and the objection was sustained (R. 72).

Next, petitioner's counsel undertook to prove what a notary public had testified to at the trial (R. 72) "for the purpose of showing that at the trial objection with respect to the relevancy of the evidence was interposed by petitioner's counsel and the objection was overruled, showing that error was committed by the trial court at that time." The objection was sustained (R. 72). Finally, petitioner's counsel asked what the United States Attorney said to the jury regarding the notary public's evidence (R. 72), "to show that error was committed in connection with the notary public's testimony", and the objection was sustained (R. 73).

At the conclusion of the hearing, the district court discharged the writ (R. 88). Petitioner, once more acting *pro se,* moved to vacate the judgment on the ground that no findings or conclusions had been entered (R. 90–91); and his motion to vacate was granted (R. 92). Thereafter, the district court entered findings of fact and conclusions of law (R. 102–106), and again discharged the writ (R. 107). On appeal, its order was affirmed. *Price* v. *Johnston,* 144 F. 2d 260 (C. C. A. 9). The circuit court of appeals pointed out, with respect to the contention of deprivation of counsel at the trial, that petitioner was asked a question after a recess, with his counsel absent; that he objected, saying, "Your Honor, I can't answer questions without being represented by counsel"; that the court then sent

the bailiff to bring the attorney back; and that, after counsel returned, the question was read back and answered in the presence of counsel. 144 F. 2d at 260–261. With respect to the absence of counsel before the U. S. Commissioner, the circuit court of appeals noted that petitioner was "well represented by counsel of his own choosing, secured but four days after his arrest and more than two months prior to trial, and was so represented on arraignment and throughout the trial." 144 F. 2d at 262.

A petition for certiorari, which did not raise any question as to the knowing use of false testimony (Pet. 8), was denied by this Court. 323 U. S. 789, rehearing denied, 323 U. S. 819 (No. 607, Oct. T. 1944).

III. Within the year following final action by this Court on his second petition, petitioner filed a third petition for habeas corpus. This was denied on August 22, 1945, on the ground that the matters raised in the third petition were known to petitioner when he filed the earlier ones, and that they could have been raised in the prior proceedings. *Price* v. *Johnston*, 61 F. Supp. 995, 996 (N. D. Cal.). Leave to appeal *in forma pauperis* was denied (R. 23).

IV. The present proceeding arose upon petitioner's fourth application for a writ of habeas corpus, presented to the United States District Court for the Northern District of California in January 1946, in which he alleged that he was

denied a fair trial in that, on the trial for bank robbery, evidence was presented to show perjury before a notary public, that the court was not justified in imposing a general sentence on the four counts of the indictment, and that the fourth count did not allege an offense (R. 5–7). After an order to show cause was issued (R. 19), petitioner amended his petition to allege (R. 20)—

> That the government knowingly employed false testimony on the trial, to obtain the conviction.

Respondent filed a return to the order to show cause in which he set forth the fact that petitioner's three prior applications had been denied (R. 20–23). Petitioner, in his traverse to the return, repeated the allegations of his original petition (R. 25–26) but merely incorporated by reference the allegation of the amended petition that the prosecutor had knowingly used false testimony (R. 26). The district court denied the petition and discharged the order to show cause (R. 30).

On appeal, a panel of the Circuit Court of Appeals for the Ninth Circuit ordered up the original files in petitioner's three previous applications for habeas corpus, and directed that petitioner be brought before the court for the argument of his appeal (R. 41). After the argument, the submission of the cause was set aside and the case was assigned for hearing before the court en banc (R. 41–42). Petitioner then moved

the court en banc for an order directing his appearance for the reargument (R. 42–43). On January 6, 1947, the court denied the motion (R. 43–44), holding that circuit courts of appeal are without power to order the production of a prisoner for such purpose (R. 44–48). Judge Stephens, concurring, expressed the view that the court had such power, but concurred in the denial of the motion as a matter of discretion (R. 48). Judge Denman filed an opinion, in which Judge Orr concurred, dissenting from the majority's holding that no power existed to grant the relief sought, but without reaching the question of the propriety of exercising the power (R. 48–52).

The appeal was then considered on briefs filed by petitioner and respondent and on oral argument by an Assistant United States Attorney (R. 53). On May 5, 1947, the order of the district court denying the application for the writ was affirmed (R. 66). A majority of the court held that the district court had discretionary power to deny a habeas corpus petition "because of an abusive use of the privilege of the writ through the filing of successive petitions presenting seriatim grounds at all times within the knowledge of the applicant." (R. 53–54.) The majority opinion (R. 53–58) points out that the only new ground urged by petitioner was the bare allegation by way of an amendment to his petition that the prosecution knowingly employed

false testimony to obtain his conviction; that in the district court no facts were set forth to support this conclusion; and that in his brief in the circuit court of appeals, petitioner enlarged on the point only to the extent of referring to the fact that at the trial one witness had changed his testimony after being taken to the district attorney's office (R. 54–55). The majority stated (R. 56):

> On the face of his showing it is apparent he knew as much about the misconduct at the time it is said to have occurred as he knows now. Yet no reason or excuse is attempted to be advanced for his failure to set it up in one or the other of his prior petitions.

The court accordingly held that the case was a proper one for the application of the principle announced by this Court in *Wong Doo* v. *United States*, 265 U. S. 239, 241, that "To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus;*" and that the district court did not abuse its discretion in denying the petition. The majority opinion concludes (R. 57–58):

> * * * Where there have been repeated petitions with an apparent husbanding of grounds the onus may properly be cast on the applicant of satisfying the court that an abusive use is not being made of the writ. Conversely, no matter if there have

> been a multiplicity of petitions, grounds newly asserted and seemingly valid must be inquired into if circumstances appear or are fairly shown to excuse the prior failure to assert them. It should be unnecessary to add that even in the absence of such a showing the court may issue the writ and proceed to inquire if in a particular case it is thought that the ends of justice dictate that course. We are not here concerned with a compulsive principle analogous to res judicata, nor with some empty formula to be applied without reflection or as a matter of course. We are speaking rather of a discretionary power resting in the conscience of the judge, to be exercised in light of the circumstances of the particular case and on grounds which square with reason and justice.

Judges Denman and Stephens filed separate dissenting opinions. (R. 58–66.)

After certiorari had been granted by this Court, petitioner on July 14, 1947, moved "for the appointment of counsel to represent your petitioner in this Honorable Supreme Court on the hearing of certiorari", and on October 13, 1947, a member of the bar was duly appointed as such counsel (Journal, Oct. T. 1947, p. 7).

SUMMARY OF ARGUMENT

I. A. Petitioner's contention that the prosecution knowingly used false testimony at his trial shows on its face that it is without merit; and

it is not new. The circumstances surrounding the witness Donner's "change" of testimony and his conference with the United States Attorney were known to petitioner's counsel at his trial, and were the subject of cross-examination of Donner by such counsel. These circumstances were also known to the attorney who represented petitioner in connection with his first petition for habeas corpus, and were advisedly not pressed by him. It is thus apparent that the court below was correct in stating that petitioner knew as much about the alleged misconduct when it occurred as he knows now. Moreover, the papers filed in connection with his earlier petitions for habeas corpus demonstrate the insubstantiality of his present reckless allegation.

B. Even though, in the federal courts, the common law doctrine of *res judicata* does not extend to a decision on habeas corpus refusing to discharge a prisoner, this Court has held that a federal court may base its refusal to discharge on a prior refusal by another court or judge. *Salinger* v. *Loisel*, 265 U. S. 224; *Wong Doo* v. *United States*, 265 U. S. 239. Petitioner here is seeking to obtain the advantage of the first part of this rule—no *res judicata*—while rejecting the burden of the second part, viz., that controlling weight may be given to the three prior refusals, when, on a fourth petition, nothing not previously available is pre-

sented. There is no sound basis for a conclusion so obviously selective. Decisions by judges of wisdom and fortitude reflect an increasing recognition of the principle that "Even this great writ can be abused, and when the question has once been decided upon full consideration, there must be an end, else the court becomes the puppet of any pertinacious convict." *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604, 606 (C. C. A. 2), certiorari denied, 323 U. S. 790. And, in fact, even where repeated petitions for habeas corpus have attained some success as a matter of pleading, they have in fact vindicated no rights; a claim for release which lacks merit does not improve through repeated exposure to litigation.

C. The records of petitioner's first three applications were before the court below on the present appeal, though they seem not to have been examined with care, since that court assumed, contrary to the fact, that petitioner's allegations on his fourth attempt raised new matter. But even on that assumption, the decision below was correct; even a new allegation in a later petition must indicate, as a matter of good faith, why it was not earlier made. That requirement was not met here.

1. In the district court, the only ground set up by petitioner which presented an issue cognizable on habeas corpus was his bare allegation

that the Government knowingly employed false testimony in his trial, an allegation which was in no way amplified by reference to any specific facts relating to petitioner's trial. Such mere statement of legal conclusion without any attempt to indicate the supporting facts is insufficient to justify the issuance of the writ, even if the petition were the first application therefor. Of course petitions for writs of habeas corpus "ought not to be scrutinized with technical nicety" (*Holiday* v. *Johnston*, 313 U. S. 342, 350), but there is a vast difference between a statement of specific facts relating to a particular case and the copying of a legal headnote setting forth a general principle in the hope that somehow, by some means unknown to the petitioner or by some recklessness of assertion, his case may be brought within that principle. Particularly in view of the requirement laid down in *Walker* v. *Johnston*, 312 U. S. 275, that issues of fact must go to hearing however improbable they may be on their face, it is important, we submit, that a petitioner show his good faith by setting forth the facts which he expects to be able to prove. Since petitioner failed to meet that requirement in the district court, that court did not err in declining to issue the writ.

2. The circuit court of appeals treated the case as if petitioner had in the district court alleged the facts which he set forth in his brief on appeal.

Those facts were probably sufficient to warrant issuance of the writ if alleged in a first petition. But the court below was justified in holding that something more can legitimately be required when the facts are alleged in a fourth petition rather than in the first.

The opinion below does not hold that the denial of one petition forever precludes the granting of the writ on the same or different grounds, and it in no way encourages the denial of a subsequent petition alleging new grounds discovered after the earlier petitions were determined. It merely imposes the requirement that a petitioner state to the court all the grounds of invalidity of which he is aware at the time he presents his first petition. In this respect it merely reiterates the holding in *Wong Doo* v. *United States*, 265 U. S. 239, 241, that "to reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*."

All that the majority opinion requires is that, in subsequent petitions for the writ, the petitioner set forth enough so that the judge to whom the petition is presented will have some basis for determining whether the applicant is seeking to make an abusive use of the writ. That, we submit, is reasonable judicial administration which in no way curtails the privilege of the writ.

D. The abusive use which can and has been made of petitions for habeas corpus has been causing increased concern to judges and courts and has been for some years past a matter for the attention of the Judicial Conference. The most vexing abuse is the apparently increasing practice of many prisoners of filing successive petitions setting up *seriatim* various attacks on their judgments of conviction. Such successive petitions overburden the courts and, in some instances, may postpone for long periods the will of Congress and the mandate of the courts.

The abusive use of the writ can be curbed without in any way infringing upon the privilege of the writ by requiring petitioners to show their good faith in setting forth facts rather than legal conclusions in their petitions, and by requiring them to explain, when successive petitions are filed, why the new grounds urged were not previously presented.

II. On the subsidiary question of petitioner's right to be brought before the circuit court of appeals to argue his appeal, we think that the court below correctly interpreted the "all writs" provision of Section 262 of the Judicial Code as denying the power to cause petitioner's production for that purpose. The issuance of a writ of habeas corpus to enable a prisoner to conduct his own cause is not "agreeable to the usages and principles of law." No such writ was known to

the common law. The English courts disclaim the existence of any such power as is contended for here, and no American decision supports it.

If it be assumed *arguendo* that the naked power exists, it by no means follows that an order producing the petitioner should have been made here. Section 272 of the Judicial Code, granting to parties the right to "plead and manage their own causes personally," does not require the court to bring before it a prisoner who, because of his conviction, is not free to come and go as he pleases. It may well be that petitioner, by moving this Court to appoint counsel for him here, has waived the point.

If his contention under this heading were sound, it would equally require his transportation from Alcatraz to Washington, under guard and at public expense, to argue the present case. Quite apart from the circumstance that oral argument is not an essential ingredient of due process, as the practice of this Court on motions to dismiss or affirm and on petitions for writs of certiorari graphically demonstrates, the court below was amply warranted, in its discretion, having regard to the potentialities of escape and to the helpfulness or otherwise of a lay prisoner's legal argument, in denying petitioner's application. Certainly in the circumstances of this case no abuse of discretion can be shown.

ARGUMENT

I

PETITIONER'S FOURTH SUCCESSIVE APPLICATION FOR HABEAS CORPUS WAS PROPERLY DENIED WITHOUT A HEARING SINCE IT ALLEGED NOTHING WHICH HAD NOT BEEN PREVIOUSLY KNOWN AND CONSIDERED

A. PETITIONER'S CONTENTION THAT THE PROSECUTION KNOWINGLY USED FALSE TESTIMONY AT HIS TRIAL SHOWS ON ITS FACE THAT IT IS WITHOUT MERIT; AND IT IS NOT NEW

Petitioner's fourth successive application for habeas corpus was amended to allege (R. 20) "That the government knowingly employed false testimony on the trial, to obtain the conviction." No facts to implement this conclusion were brought to the attention of the district court, but in his brief in the circuit court of appeals petitioner stated (R. 55):

> that the United States attorney, in the course of the trial, "did take the one and only witness, Donner, that testified that there had been a crime committed, from the witness stand after he had testified that he could not see any guns or pistols during the robbery, to the district attorney's office, and talked about the evidence and put the witness Donner back on the witness stand to testify that he did see the pistols, and described them, when he could not do so at first."

It is significant that petitioner nowhere alleges that these circumstances, alleged to have occurred

at the time of his trial in 1938, had not been known to him prior to the amendment of his fourth successive petition for habeas corpus in 1946. Nor could he supply any such allegation by further amendment, or, indeed, by averments in a fifth petition; the fact of the matter is, and it is disclosed by the record of his first petition for habeas corpus, that Donner's "change" of testimony and his conference with the United States Attorney, were known to petitioner and to petitioner's counsel at the time of the original trial, and were the subject of forceful cross-examination at the trial by petitioner's counsel. R. 194–196, No. 1081, Oct. T. 1941. All that has been added now is a conclusion, obviously shaped in an endeavor to bring the facts within the head-note of *Mooney* v. *Holohan*, 294 U. S. 103.

The circumstances surrounding Donner's "change" of testimony and his conference with the United States Attorney were known not only to petitioner's counsel at the trial, they were also known to the attorney who represented petitioner in connection with his first petition for habeas corpus. It is now suggested (Pet. Br. 7) that failure to make timely reference to the contention that false testimony was knowingly used simply reflects "petitioner's inartistic and imprecise method of presenting his case", and (Pet. Br. 15) that "petitioner, in his inarticulate and legally imprecise manner, did try to raise" this

ground earlier. It would, we submit, be far more realistic to suggest that in truth the point had no merit then, that petitioner's counsel on his first petition recognized this lack of merit, and that, on the first appeal, when petitioner, once again proceeding *pro se*, complained that counsel had blocked him from amending the petition (R. 213, No. 1081, Oct. T. 1941), he was in effect contending that he knew more law than his lawyer.

It is further significant that, in connection with his second petition for habeas corpus, petitioner abandoned any contention that false testimony had been knowingly used, and that, at the hearing on the second petition, when given an opportunity to enlarge his allegations, he made no mention of the point (*supra*, pp. 11–15). Indeed, apart from the patently frivolous points about lack of counsel, which were adequately disposed of by the appellate opinion (144 F. 2d 260), the hearing on the second petition involved simply attempts to attack collaterally the rulings on evidence made during the course of petitioner's trial.

Examination of the records on petitioner's first two applications for habeas corpus (No. 1081, Oct. T. 1941; No. 607, Oct. T. 1944) makes it abundantly clear that the court below correctly said of petitioner's present amended contention (R. 56),

> On the face of his showing it is apparent he knew as much about the misconduct at the time it is said to have occurred as he knows now.

Examination of those records also makes it abundantly clear that the sentiments expressed in the dissents below, however sound and laudable they may be theoretically,[1] have no substantial relationship to the facts of the present case.

In short, what petitioner now alleges—change of testimony consequent upon a witness's conference with the prosecutor—was known to him and to his counsel at his original trial; it was known to and advisedly disregarded by another lawyer in connection with his first application for habeas corpus; it may well have been known to the lawyer who represented him on his second application; and it shows on its face that it does not support his present reckless contention that

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[1] "* * * this decision establishes a principle hamstringing a wrongfully imprisoned man. It plainly makes it the law for this circuit that a man convicted on perjured testimony procured by a United States attorney, but who does not discover the facts until after he had filed a petition for the writ on another ground, must serve his sentence—here for 65 years" (R. 58).

"In the instant case the cause alleged by petitioner is entirely different from any heretofore alleged. If what petitioner now alleges is true, he was convicted upon perjured testimony suborned by the prosecuting attorney. * * * It may be that he has but recently obtained information which in his opinion will prove his charges. The possibilities are endless, and they should not be denied judicial investigation because all of them seem improbable" (R. 65).

"he was convicted upon perjured testimony subborned by the prosecuting attorney" (R. 65).

B. EVEN WHERE THE DENIAL OF A WRIT OF HABEAS CORPUS IS NOT RES JUDICATA, THE COURTS MAY PROPERLY GIVE CONTROLLING WEIGHT TO THE PREVIOUS DENIAL OF A WRIT WHERE THE APPLICANT MAKES NO SHOWING OF ANY CHANGE OF CIRCUMSTANCES

The rule laid down by this Court is that although the common law doctrine of *res judicata* does not extend to a decision on habeas corpus refusing to discharge a prisoner, a federal court may base its refusal to discharge on a prior refusal by another court or judge. *Salinger* v. *Loisel*, 265 U. S. 224; *Wong Doo* v. *United States*, 265 U. S. 239.

Thus, in the case first cited, the Court said (265 U. S. at 230–231):

> But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered. In early times when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed,—just as when a right to a comprehensive review in criminal cases was given the scope of inquiry deemed admissible on *habeas corpus* came to be relatively narrowed.

> The federal statute (§ 761, Rev. Stats.) does not lay down any specific rule on the subject, but directs the court "to dispose of the party as law and justice may require." A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application. * * *

And in the *Wong Doo* case, the Court stated (265 U. S. at 241):

> It therefore must be held that in this case the courts below erred in applying the inflexible doctrine of *res judicata*. But it does not follow that the judgment should be reversed; for it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to the prior refusal. The only ground on which the order for deportation was assailed in the second petition had been set up in the first petition. The petitioner had full opportunity to offer proof of it at the hearing on the first petition; and, if he was intending to rely on

> that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time. * * *

What petitioner here is seeking to do is obtain the advantage of the first part of the rule, viz., that the three prior rejections do not amount to *res judicata*, and to reject the burden of the second part of the rule, to the effect that those three prior rejections may none the less be given controlling weight when, on a fourth application, petitioner presents nothing that was not available to him earlier.

We submit that there is no sound basis for a conclusion so obviously selective. But because of a tendency in some recent decisions to adopt a similar approach, we think it may be helpful to the Court if we reexamine in some detail the cases dealing with successive applications for habeas corpus.

1. In England, an applicant has the right to apply successively to every judge competent to issue a writ of habeas corpus, and each judge must determine such an application on its own merits regardless of the decision of any other judge or tribunal, even though the grounds urged

are precisely the same. *Ex parte Partington,* 13 M. & W. 679, 684, *per* Parke, B.; *Cox* v. *Hakes,* 15 App. Cas. 506 (H. L.); *Eshugbayi Eleko* v. *Government of Nigeria,* [1928] A. C. 459 (P. C.). But in England there is no appeal from an order discharging the prisoner. *Cox* v. *Hakes, supra.*

2. In the United States, however, where a wider right of appeal became well-nigh universal, a different judicial attitude resulted, evidenced by the case of *Cuddy.* Cuddy was a Los Angeles lawyer who had been sentenced to six months' confinement for contempt of court, viz., tampering with a prospective juror. He petitioned for a writ of habeas corpus; the writ was denied; he appealed; and on appeal the judgment was affirmed. *Cuddy, Petitioner,* 131 U. S. 280. Thereafter he applied for a second writ, on the prior record plus additional matter—petitioner's testimony at the trial of the contempt proceeding—which could have been but was not included on the record on appeal. Mr. Justice Field, sitting on circuit, denied the second application because no change of circumstances was alleged. *Ex parte Cuddy,* 40 Fed. 62 (C. C. S. D. Cal.). He said (40 Fed. at 65–66):

> I return, therefore, to the question whether the petitioner can renew his application for a writ after the decision of the supreme court on his appeal to that tribunal, without first having obtained its leave. If he can renew it on another

record, which may also be in some other particular defective, and so on indefinitely whenever he fails on appeal, it is plain that this writ may often become an instrument of oppression, instead of a means of relieving one from an unjust and illegal imprisonment. The writ of *habeas corpus,* it is true, is the writ of freedom, and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice of the kingdom having the right to grant such writs. No appeal or writ of error was allowed there from a judgment refusing a writ of *habeas corpus;* nor, indeed, could there have been any occasion for such an appeal or writ of error, as a renewed application could be made to every other justice of the realm. The doctrine of *res judicata* was not held applicable to a decision of one court or justice thereon; the entire judicial power of the country could thus be exhausted. *Ex parte Kaine,* 3 Blatchf. 5, and cases there cited. The same doctrine formerly prevailed in the several states of the Union, and, in the absence of statutory provisions, is the doctrine prevailing now. In many instances great abuses have attended this privilege, which have led in some of the states to legislation on the subject. And, in the absence of such legislation, while the doctrine of *res judicata* does not apply, it is held that the officers before whom the second application is

made may take into consideration the fact that a previous application had been made to another officer and refused; and in some instances that fact may justify a refusal of the second. The action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it. I hardly think that an ordinary justice would feel like disregarding and setting aside the judgment of a magistrate like Chief Justice Marshall, or Chief Justice Taney, who had refused an application for a writ after full consideration. In some states an exception is also ingrafted upon the general doctrine where a writ is issued to determine, as between husband and wife, which of the two shall have the custody of their children. In what I have said I refer, of course, to cases where a second application is made upon the same facts presented, or which might have been presented, on the first. The question is entirely different when subsequent occurring events have changed the situation of the petitioner so as in fact to present a new case for consideration. In the present application there are no new facts which did not exist when the first was presented. And under the law of the United States an appeal is allowed to the supreme court where the writ is refused, a provision which would

seem to have been adopted to prevent a second application upon the same facts which were or might have been presented in the first instance. I am of the opinion that in such a case a second application should not be heard, except where the judgment of affirmance by the supreme court is rendered without prejudice to, or with leave to make a new application by, the petitioner. He need not have appealed from the refusal of the district court; he could have applied to the circuit judge, and also, afterwards, to the circuit justice. He did not think proper to pursue that course, but took his appeal to the supreme court, and during the argument there no suggestion was made that the record did not fully disclose the petitioner's case; and when that tribunal decided the case, no request was made for permission to renew the application; and now the imprisonment of the petitioner under the judgment affirmed by that court is drawing to a close; it will expire with this day. This writ must therefore be dismissed, and the prisoner remanded; and it is so ordered.

3. In consequence of Mr. Justice Field's ruling—which, later, was expressly approved in *Salinger* v. *Loisel, supra*, 265 U. S. at 231–232—there have been numerous decisions in the federal courts refusing to entertain later applications for habeas corpus in the absence of a bona fide showing of a change of circumstances. *Dorsey* v.

Gill, 148 F. 2d 857 (App. D. C.), certiorari denied, 325 U. S. 890, overruling *Ex parte Rosier*, 133 F. 2d 316 (App. D. C.); *Rookard* v. *Huff*, 145 F. 2d 708 (App. D. C.); *Pope* v. *Huff*, 141 F. 2d 727 (App. D. C.); *Beard* v. *Bennett*, 114 F. 2d 578 (App. D. C.); *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604 (C. C. A. 2), certiorari denied, 323 U. S. 790; *Slaughter* v. *Wright*, 135 F. 2d 613 (C. C. A. 4); *United States ex rel. Karpathiou* v. *Jordan*, 153 F. 2d 810 (C. C. A. 7), certiorari denied, 328 U. S. 868; *Conley* v. *Pescor*, 157 F. 2d 280 (C. C. A. 8); *Rolfe* v. *Lloyd*, 102 F. 2d 606 (C. C. A. 9); *Swihart* v. *Johnston*, 150 F. 2d 721 (C. C. A. 9), certiorari denied, 327 U. S. 789; *Garrison* v. *Johnston*, 151 F. 2d 1011 (C. C. A. 9), certiorari denied, 328 U. S. 840; *Pagett* v. *McCauley*, 95 F. 2d 839 (Senior Circ. J., 9th Cir.); *Ex parte Moebus*, 148 Fed. 39 (C. C. D. N. H.); *Maniglia* v. *Commander of the Guiseppe Verdi*, 5 F. 2d 680 (D. Mass.), appeal dismissed, 273 U. S. 779; *Mothershead* v. *King*, 37 F. Supp. 210 (W. D. Mo.); *Wheeler* v. *Kaiser*, 45 F. Supp. 937 (W. D. Mo.); *Price* v. *Johnston*, 61 F. Supp. 995 (N. D. Cal.) (present petitioner's third application). Something must appear which could not have been considered on the first application. *Remaley* v. *Swope*, 100 F. 2d 31 (C. C. A. 9). There must be a new point, in a situation where no fair grounds exist for thinking that an abuse of

process is involved. *United States ex rel. Bruno v. Reimer,* 103 F. 2d 341 (C. C. A. 2).

Illustrative of the approach employed by the courts "to prevent an abuse even of a writ of right and freedom" (*Ex parte Kopel,* 148 Fed. 505, 506 (S. D. N. Y.), *per* Hough, D. J.), is the case of *Ex parte Moebus,* 148 Fed. 39 (C. C. D. N. H.), where the petitioner, after unsuccessfully seeking relief in the state courts (*Petition of Moebus,* 73 N. H. 350) and from two federal judges, came, on this third federal attempt, before one of the circuit judges for the First Circuit. Judge Putnam said (148 Fed. at 40–41):

> Also, the petitioner made separate applications to the United States district judge for the district of New Hampshire [Aldrich, D. J.] and to the justice of the Supreme Court of the United States assigned to this circuit [Mr. Justice Holmes], each of which applications was denied. At common law, it was settled that a refusal by any judge to grant a writ of habeas corpus, or a refusal of any judge to discharge from custody a petitioner by, or in behalf of, whom such a writ had been granted, did not constitute res judicata, but that the petitioner was at liberty to apply to any other judge, and so on until the whole series of judges had been exhausted. It is, however, commonly understood that the rule is practically otherwise in those jurisdictions where statutory rights of appeal, or writs of error, have

been granted with reference to such proceedings, and that, either as a rule of law or as a practical rule of administration, no judge would allow a writ when some other judge has refused it; but that any subsequent judge would remit the applicant to his remedy by appeal, or writ of error, unless some substantial change in the circumstances had intervened. In the present case, there has been no such change of circumstances, and, therefore, it may well be that we should have refused to consider this application at all, and should hold the applicant to his remedy by appeal under the statute, with the consequent further holding that, if the statutory time for an appeal had expired, the applicant had lost his rights if he had any. As, however, the petitioner has now for the first time applied to us formally, we have concluded to allow him to complete the circle made up of the justice of the Supreme Court assigned for this circuit, the district judge for the district of New Hampshire, and myself as the circuit judge who ordinarily attends to such matters in that district as come before the circuit judges. We do this more particularly in order that the petitioner may take out his appeal, if he desires so to do, *but with the express statement that no further applications of the character now before us will be entertained by us.* [Italics added.]

Only recently, Judge Learned Hand summed up the same thought more succinctly in one of

the numerous applications made by one of the most litigious of modern prisoners (*United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604, 605 (C. C. A. 2), certiorari denied, 323 U. S. 790):

> While it is quite true that an order dismissing one writ of habeas corpus does not formally estop the relator from suing out another on the same grounds, that does not mean that he may again and again call upon the court to repeat its rulings. Even this great writ can be abused, and when the question has once been decided upon full consideration, there must be an end, else the court becomes the puppet of any pertinacious convict.

Here, having regard to the staleness of and obvious lack of merit in petitioner's current contention, it is obvious that in essence he is arguing that the courts must, as a matter of constitutional right, perform anew at his bidding.

4. Indeed, the books disclose that the only apparent successes of the most pertinacious of present-day convicts have not served to set them at liberty, that where a repeated application has been cast in terms which have been held sufficient, that circumstance has not enabled the applicant to go free, however much his exercise in pleading may have kindled the hopes of fellow-inmates.

(a) *Waley* v. *Johnston*, 316 U. S. 101, is currently a favored case for the proposition that

one denial is not *res judicata,* and that although "petitioner's allegations in the circumstances of this case may tax credulity" (316 U. S. at 104, cited at Pet. Br. 15), he is none the less entitled to a hearing on his later attempt. But Waley's victory here availed him not; he was unable to prove his improbable contentions, and remained in confinement. *Waley* v. *Johnston,* 139 F. 2d 117 (C. C. A. 9), certiorari denied, 321 U. S. 779, rehearing denied, 321 U. S. 804.

(b) *Hawk* v. *Olson,* 326 U. S. 271, cited at Pet. Br. 19, 20–21, is another case lending support to the proposition that a defeated litigant may profitably try again. But Henry Hawk is still in confinement; this Court only two months ago refused to review the affirmance of a judgment denying him relief. *Hawk* v. *Olson,* 66 F. Supp. 195 (D. Neb.), affirmed *sub nom. Hawk* v. *Jones,* 160 F. 2d 807 (C. C. A. 8), certiorari denied, October 13, 1947 (No. 37 Misc., this Term; Journal, p. 25). And see *Hawk* v. *Olson,* 146 Neb. 875.

(c) *Johnston* v. *Wright,* 137 F. 2d 914 (C. C. A. 9), affirming *In re Wright,* 51 F. Supp. 639 (N. D. Cal.), is an authentic instance of a prisoner who obtained release on his fourth successive writ of habeas corpus. But his victory was indeed a Pyrrhic one. The decision of the Ninth Circuit, just cited, was that his federal sentence, to begin upon the expiration of the

sentence which he was serving in a state penitentiary, was ineffective since it could not commence when he was released from the state institution under a parole order "effective when federal authorities come for him." Wright was accordingly surrendered to the state authorities, and served about ten months more in their custody. He was then recommitted, once more taken into federal custody, and, once again, petitioned for habeas corpus. The writ was once more denied, and the denial was affirmed *per curiam*, the court saying (*Wright* v. *Johnston*, 149 F. 2d 648 (C. C. A. 9)):

> Appellant has made no fewer than eight petitions for writ of habeas corpus in the Federal courts of this jurisdiction. In one of these cases, No. 23647–S, heard before Judge A. F. St. Sure, appellant made the same contention that he makes in the present petition. The court then made exhaustive findings relative thereto. The court found that appellant was not denied the right of assistance of counsel and that he was duly represented by counsel. In the instant case, the lower court on the record herein and the judgments on five other applications for writ of habeas corpus by petitioner denied the present petition. We affirm that judgment.

This Court denied certiorari (326 U. S. 786) and denied likewise two petitions for rehearing (327 U. S. 816, 819). A subsequent motion for leave

to file a petition for a writ of habeas corpus and a subsequent petition for a writ of certiorari to bring up an earlier record were also denied. *Wright* v. *Johnston*, 329 U. S. 803.

In other words, the result of Wright's successful fourth petition for habeas corpus was that he obtained the opportunity to serve some ten months more in state custody before being returned to federal custody—where he now continues.

The fact of the matter is that, absent a real change of circumstances, successive petitions for habeas corpus vindicate no rights. If a petition has merit, it will succeed on the first attempt; if it lacks merit, it is not improved through repeated exposure to litigation.

5. It may be of interest, in the present connection, to review briefly the condition of the authorities in some of the state courts respecting successive applications for writs of habeas corpus.

(a) Some jurisdictions hold squarely that since, unlike the situation obtaining at common law, orders denying petitions for habeas corpus are appealable, they are as much subject to the doctrines of *res judicata* as any other order. That is the law in five states and was the law in one antecedent territory. *Perry* v. *McLendon*, 62 Ga. 598; *Williams* v. *Lawrence*, 193 Ga. 381, certiorari denied, 315 U. S. 816; *State ex rel. Du Fault* v. *Utecht*, 220 Minn. 431;[2] *Williams* v.

[2] *In re Snell*, 31 Minn. 110, cited by petitioner (Pet. Br. 24, 25), is therefore no longer law in Minnesota. See 220 Minn. at 436.

Olson, 145 Neb. 282, certiorari denied, 325 U. S. 877; *McMahon* v. *Mead*, 30 S. D. 515 (following *Ex parte Scott*, 1 Dak. 140); *State ex rel. Durner* v. *Huegin*, 110 Wis. 189, 225–226; *State ex rel. Gaster* v. *Whitcher*, 117 Wis. 668; *Heller* v. *Franke*, 146 Wis. 517.

(b) Five other jurisdictions reach the same result by statute. In West Virginia, a statute makes rulings on habeas corpus *res judicata* in subsequent proceedings. *State* v. *Lowe*, 103 W. Va. 264. The same is true in Florida and Iowa in the absence of a showing of changed conditions. *D'Alessandro* v. *Tippins*, 102 Fla. 10; *State ex rel. Davis* v. *Hardie*, 108 Fla. 133; *State ex rel. Williams* v. *Prescott*, 110 Fla. 261; *Rathbun* v. *Baumel*, 196 Iowa 1233. In Mississippi, a statute makes rulings on habeas corpus *res judicata*. *Ex parte Pattison*, 56 Miss. 161. A second petition will be entertained if new facts are presented (*Ex parte Bridewell*, 57 Miss. 177), but not if the applicant simply tenders new testimony regarding old facts (*Ex parte Nichols*, 62 Miss. 158). In Texas, by statute, a second petition will be entertained only when important new testimony has been obtained which it was not within the applicant's power to produce at the former hearing. *Ex parte Howard*, 107 Tex. Crim. 386; *Ex parte Osborne*, 130 Tex. Crim. 111; see *Ex parte McIntosh*; 147 Tex. Crim. 622.

(c) In four and perhaps five other jurisdictions, where rulings on habeas corpus are not

technically *res judicata,* there is evident an increasing tendency to refuse to consider second applications in the absence of a showing of change of circumstances. The latest decisions of the Supreme Court of California reflect a thoroughgoing disinclination to entertain a second application for habeas corpus where no changes in the facts or the law substantially affecting the rights of the petitioner have been disclosed since the first application. *In re Miller,* 17 Cal. 2d 734; *In re De la Roi,* 28 Cal. 2d 264, 169 P. 2d 363.[3] In Oklahoma, "where an application for writ of habeas corpus has been denied, this court will not ordinarily entertain a subsequent application for a writ based on the same grounds and the same facts, or any other grounds or facts existing when the first application was made, whether presented then or not." *Ex parte Davis,* 74 Okla. Crim. 75, 76; *Ex parte Gray,* 74 Okla. Crim. 200; *Ex parte Berrie,* 75 Okla. Crim. 115; *In re Seale,* 76 Okla. Crim. 164; *In re Edwards,* 79 Okla. Crim. 259.[4]

The rule in Tennessee seems to be that a second writ will be denied on the authority of the first denial, in the absence of new evidence, even though *res judicata* as such does not apply. *State*

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[3] The earlier California cases cited by petitioner (Pet. Br. 24) no longer represent the law there.

[4] The earlier Oklahoma cases cited by petitioner (Pet. Br. 24) does not reflect the practice in that State.

ex rel. Conner v. *Hebert,* 127 Tenn. 220; *State ex rel. Guy* v. *Foster,* 160 Tenn. 285. In Pennsylvania the courts stress that the remedy for a denial of habeas corpus is by appeal, not by a new application to another court. The second petition will be denied by the Supreme Court where the first was denied by the Superior Court. *Commonwealth ex rel. Nedeau* v. *Ashe,* 342 Pa. 46; *Commonwealth ex rel. Orlando* v. *Smith,* 346 Pa. 42. Similarly, the later petition will be denied by the Superior Court where the first petition had earlier been denied by the Supreme Court (*Commonwealth ex rel. Lewis* v. *Ashe,* 142 Pa. Super. 357; *Commonwealth ex rel. Penland* v. *Ashe,* 160 Pa. Super. 316, 51 A. 2d 347), or where the first petition had been denied by a Court of Common Pleas (*Commonwealth ex rel. Jackowski* v. *Fluck,* 147 Pa. Super. 434), or where two prior petitions had been denied, respectively, by the Superior and Supreme Courts (*Commonwealth ex rel. Foster* v. *Ashe,* 146 Pa. Super 482).

The judicial approach in New Hampshire is illustrated by the second petition filed in the Supreme Court of that state by Henry Moebus, the same who had also unsuccessfully applied to three federal judges—District Judge, Circuit Judge, and Circuit Justice (*supra,* pp. 38–39). He was similarly unsuccessful on his second application to the state court. That tribunal said (*Petition of Moebus,* 74 N. H. 213, 214, 215):

> It is not alleged that anything has occurred since that decision [*Petition of Moebus,* 73 N. H. 350] affecting his legal status; so that the question presented upon this petition, having been determined against him by the former judgment, cannot be again litigated as a matter of right. * * *
>
> The petitioner is bound by that decision, which is followed and reaffirmed, with the suggestion that repeated applications for a writ of *habeas corpus* introducing no new facts material to the issue will ordinarily be summarily disposed of.

This review of the state cases indicates that petitioner has perhaps too selectively read the authorities when he states (Pet. Br. 24, n. 4), "The majority view in state courts seems to be that even the same ground may be relitigated in a hearing on a subsequent petition." In three of the eleven jurisdiction cited by him, as we have shown, notes 2–4, *supra,* the law is now the other way. In three additional jurisdictions on which he relies, decisions on habeas corpus are not appealable, so that the reason for not permitting relitigation is not present. *In re Forest,* 45 N. M. 204; *In re Pyle,* 72 Mont. 494, 497; *Brugneaux* v. *Dankowski,* 51 Wyo. 103. It follows that, as against the remaining five states which petitioner cites, respondent can point to fourteen which support a contrary view.

And, we submit, the better reason is on our side. Some of the supporting considerations are those already set out in the federal cases, quoted *supra,* pp. 30–40, 42.[1] But there are illuminating discussions in the state reports as well, and we think that the rationale supporting the refusal by a state court to entertain a fourth successive writ for habeas corpus was never better stated than by Mr. Justice Bleckley of the Supreme Court of Georgia in the case of *Perry* v. *McLendon,* 62 Ga. 598, *supra:* The rugged common sense of his opinion warrants, in our view, extended quotation (62 Ga. at 604–605):

> A single judgment will serve to hang a man, if left to stand unreversed. He cannot have trial after trial to ascertain if he is guilty, and determine whether he is to be executed. One complete trial, fair and legal, will carry him out of the world; and why should it not suffice to keep him in jail until some new right to a deliverance has arisen? Is the same alleged right to be investigated over and over, each time afresh, just as if no prior investigation had taken place? Is the grievance, real or supposed, of a prisoner the stone of Sisyphus which courts can never bring to a place of rest? and if called to lift it up

[1] It is significant that petitioner does not mention, let alone discuss, the numerous authorities in the lower federal courts which hold contrary to his contentions.

the same hill as often as it rolls down, must they comply? Doubtless there is an obligation to issue the writ of *habeas corpus* whenever, and as often as, it may be applied for, provided the petition contains the requisite matter, is in due form, duly authenticated, duly presented, and does not show on its face that the imprisonment, though complained of as illegal, is in fact legal. Code, § 4012. But when it appears, on the return or at the hearing, that the legality of the imprisonment has already been adjudicated upon a previous writ between the same parties, by a competent tribunal, the production of that judgment is the end of controversy. Further writs may be applied for and issued, but to each and all of them the one valid and subsisting judgment will be a conclusive answer, as to any and all objections to the legality of the restraint which were embraced in the first petition, or which could and should have been embraced in it. The effect of a judgment cannot be avoided by a difference in the pleadings, when those in the first case could and should have been as full as those in the second, though in fact they were not. No party, plaintiff or defendant, is permitted to stand his case before the court on some of its legs, and if it falls, set it up again on the rest in a subsquent proceeding, and thus evade the bar of the former judgment. It is the body of a case and not certain of its limbs

only, that the final judgment takes hold upon. Whoever brings the legality of an imprisonment into question by writ of *habeas corpus,* should, in the first instance, show as much cause for his attack as he can. He must discharge all his weapons, and not reserve a part of them for use in a future reencounter. He must realize that one defeat will not only terminate the campaign, but end the war.

C. EVEN A NEW ALLEGATION IN A LATER PETITION FOR HABEAS CORPUS MUST INDICATE, BY WAY OF EARNEST OF GOOD FAITH, WHY IT WAS NOT EARLIER PRESENTED; AND THAT REQUIREMENT WAS NOT MET IN THE INSTANT CASE

Although the records of petitioner's first three applications were before the court below on the hearing of the present appeal (R. 41), they seem not to have been examined with any care, as the majority and dissenting judges all assumed that petitioner's allegations on his fourth attempt raised new matter. But, even on that assumption, which, as we have already shown (*supra,* pp. 26–30), is without foundation, the decision below was correct.

1. The fourth petition for habeas corpus failed to allege sufficient facts to warrant the issuance of the writ by the district court

It is not suggested here that petitioner's fourth petition for habeas corpus, as originally filed (R. 5–7), alleged any grounds which would require issuance of the writ. Petitioner's allegations of

error in the course of the trial clearly stated no grounds cognizable on habeas corpus, and his attack upon the validity of the fourth count of the indictment was obviously without merit, and had, in addition, been adjudicated against him on his second petition for a writ. Thus, the only allegation before the district court which could even remotely be held to raise an issue requiring a hearing was the bare allegation in his amended petition (R. 20)—

> That the government knowingly employed false testimony on the trial, to obtain the conviction.

In the district court, that allegation was in no way amplified by reference to any specific facts relating to petitioner's trial.

Such a bare allegation of a legal conclusion without any attempt to indicate the supporting facts is insufficient to justify the issuance of the writ, whether the petition be the first or the twentieth application therefor. The courts have so held, and, we submit, rightly so. *Hodge* v. *Huff*, 140 F. 2d 686, 688 (App. D. C.), certiorari denied, 322 U. S. 733; *Long* v. *Benson*, 140 F. 2d 195, 196 (C. C. A. 6), certiorari denied, 322 U. S. 732. In this connection, we think the time has come to reemphasize the rule, early laid down by this Court and frequently repeated since, that mere general allegations of conclusions of law, without facts to support them, are insufficient

to warrant the issuance of the writ. *Cuddy, Petitioner,* 131 U. S. 280, 286; *Kohl* v. *Lehlback,* 160 U. S. 293, 299; *United States* v. *Ju Toy,* 198 U. S. 253, 261; *Collins* v. *McDonald,* 258 U. S. 416, 420. We do not by this suggestion mean to question the later rulings of this Court which hold that petitions for writs of habeas corpus "ought not to be scrutinized with technical nicety." *Holiday* v. *Johnston,* 313 U. S. 342, 350; see also *Tomkins* v. *Missouri,* 323 U. S. 485, 487; *Pyle* v. *Kansas,* 317 U. S. 213, 216. But there is a vast difference between an inartistic statement of specific facts relating to a particular case and the copying of a legal headnote setting forth a general principle, such as the principle that the denial of assistance of counsel or the knowing use of perjured testimony are adequate grounds for discharge on habeas corpus. Particularly in view of the statutory requirement emphasized by this Court in *Walker* v. *Johnston,* 312 U. S. 275, that issues of fact must go to hearing however improbable they may be on their face, it is important, we think, that a petitioner show to the court to which the petition is presented that there is a real issue of fact arising in his case, and that he is not merely invoking the process of the court in a wishful—or, as here, reckless—attempt, somehow, by means not clearly known to him, to bring his case within some prior decision. True, laymen

need not be held to the standards of technical proficiency required of lawyers. But a layman who can write English can as easily—indeed, more easily—present the facts as he knows them, than he can advance legal conclusions. If a petitioner expects to prove that perjured testimony was used against him, he must know the nature of the alleged perjury and the significance of that testimony at his trial. There is no infringement of the writ in a requirement which would compel an applicant to state to the court, however crudely, the nature of such perjury, the significance of the testimony, and the reasons for his belief that the prosecutor was a knowing party thereto. After all, the habeas corpus statute itself requires the allegation of facts. See R. S. 754 and 760, *supra*, pp. 3–4. We are not insisting that a lay applicant for the writ be held to a standard of clear proof of a *prima facie* case, but we do think that he should be required to allege enough to show that he is advancing a genuine issue of fact. We do not demand legal artistry; we ask only a showing of good faith.

On this basis, we submit, petitioner's bare allegation in the district court that the prosecutor had knowingly used false testimony failed to state a cause of action. On the part of the district judge, therefore, there was clearly no error in the denial of the writ.

2. Considering the petition as amplified by petitioner's brief in the circuit court of appeals, the court was warranted in denying petitioner's fourth application because of his failure to show good faith

The circuit court of appeals treated the case as if petitioner had alleged in the district court the facts set forth in his brief in the circuit court of appeals, to the effect that the United Stafes Attorney, in the course of the trial—

> * * * "did take the one and only witness, Donner, that testified that there had been a crime committed, from the witness stand after he had testified that he could not see any guns or pistols during the robbery, to the district attorney's office, and talked about the evidence and put the witness Donner back on the witness stand to testify that he did see the pistols and described them, when he could not do so at first." * * * (R. 55.)

It is a little difficult to understand how a district court can be held to knowledge of statements never brought to its attention. However, since the circuit court of appeals did consider the case as if those facts had been alleged in the district court, we too, shall treat the case as if it were in that posture.

We assume under this heading that the facts set forth in petitioner's brief would, if alleged in a first petition for habeas corpus, have been sufficient to meet the requirements to which we have adverted just above, and thus would have

been sufficient to require the issuance of the writ. The question thus is whether a court, in the exercise of its discretion, may require something more when those facts are set forth in a fourth petition, rather than the first—a fourth petition filed eight years after the judgment of conviction, and five years after the first petition.

It is important in this connection to note just what the majority decision below does and does not hold. As appears from the concluding portion of the majority opinion below which we have quoted at pp. 18–19, *supra*, the majority does not hold, as the dissenting judges apparently assume, that the denial of one petition forever precludes the granting of a subsequent petition alleging the same or different grounds. It clearly recognizes that, where a petitioner does show to the court that grounds asserted in a later petition were unknown at the time the earlier petition was filed, the court would be required to issue the writ. It also recognizes that, where a petition makes a real showing that the proceedings which led to conviction were invalid, then the denial of numerous prior petitions would not in itself justify refusal to grant the writ and order a hearing. The majority decision below leaves the way clear for that result in any proper case. It thus in no way conflicts with the holdings of this Court in such cases as *Hawk* v. *Olson*, 326 U. S. 27, and *Waley* v. *Johnston*, 316 U. S. 101, where hearings were directed although prior petitions

had been denied. That the district judges sitting in the Ninth Circuit have so recognized is shown by the fact that, following the decision of the Ninth Circuit in *Swihart* v. *Johnston,* 150 F. 2d 721, certiorari denied, 327 U. S. 789, in which a panel of the circuit court of appeals laid down the rule enunciated in the majority opinion below, a district court ordered the discharge of a prisoner on a writ of habeas corpus alleging denial of assistance of counsel, even though the issue had previously been litigated on prior writs of habeas corpus. *McDonald* v. *Johnston,* 62 F. Supp. 830 (N. D. Calif.). The solicitude of the district judge to preserve the rights of the prisoner is strikingly illustrated by the fact that his order of discharge was based on grounds subsequently held insufficient by the circuit court of appeals with the result that his order was reversed. *Johnston* v. *McDonald,* 157 F. 2d 275 (C. C. A. 9), certiorari denied, 329 U. S. 795.

All that the decision below requires is that a person who makes a fourth application for a writ establish his good faith by explaining to the court why the facts presently urged were not previously presented to it. There is no real curtailment of the writ in that ruling which, as we view it, merely seeks to impose the requirement that, in general, a petitioner state to the court all the ground of invalidity of which he is aware at the time he presents his first petition.

Petitioner seems to argue (Pet. Br. 14, 25–26) that it was somehow the duty of the United States Attorney or of the trial court to have called on him to explain why, although represented by counsel at his first two attempts at release, he did not earlier make more clear his present claim. But it is not the law that mere general allegations of illegal confinement are sufficient to shift the burden of proof on the respondent jailer. See cases cited *supra*, pp. 51, 52. Quite to the contrary, the burden when a judgment of conviction is collaterally attacked is on the petitioner. *Johnson* v. *Zerbst*, 304 U. S. 458, 468–469; *Hawk* v. *Olson*, 326 U. S. 271, 279.

It is an abuse of process to require successive hearings and successive productions of witnesses in court when the facts were at all times in the knowledge of petitioner and capable of being litigated in one proceeding—a circumstance which the present proceeding emphasizes, since here, as we have shown (*supra*, pp. 6–11, 26–30), the facts relied upon were known to petitioner and to his counsel at the original trial. Very frequently the judgment attacked by a writ of habeas corpus may have been rendered in a court many miles away from the place of incarceration. Normally, the witnesses whose testimony will be required are the presiding judge, the United States Attorney and the court clerk, also many miles away. It is to the advantage of everyone, the court, the United States Attorney, and petitioner himself that the

full testimony of these witnesses be obtained at one time and not at two, five, or twenty separate occasions. As this Court said in *Wong Doo* v. *United States*, 265 U. S. 239, 241, "To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*." In the *Wong Doo* case the grounds relied upon in the second petition were set forth in the first but not pressed at the hearing. The same is true here, but the situation would be no different if grounds known to petitioner at the time of the first hearing were withheld by not being alleged at all. Consequently there is no occasion for acceding to petitioner's present suggestion (Pet. Br. 18) that the habeas corpus court should determine, as an issue of fact, upon hearing, whether there has been an "apparent husbanding" of grounds. The facts appear very plainly from the records of petitioner's successive applications, and the matter was properly and adequately determined on the order to show cause (R. 19, 30).

An excellent illustration of just how abusive the practice of requiring the courts to hold successive hearings on successive applications for habeas corpus may be appears in the recent decision of the District Court of Kansas in the case of *Casebeer* v. *Hudspeth*, decided July 24, 1947 (Appendix, *infra*, pp. 89–92). Casebeer was convicted of bank robbery in 1936, and his conviction was affirmed on appeal, *Casebeer* v. *United States*, 87

F. 2d 668 (C. C. A. 10). On a petition for habeas corpus he was given a full hearing at which the testimony of a number of witnesses was taken. The writ was discharged and the order of discharge was affirmed on appeal, *Casebeer* v. *Hudspeth*, 121 F. 2d 914 (C. C. A. 10). A petition for a writ of certiorari was denied by this Court, 316 U. S. 683. Thereafter, Casebeer filed two motions to correct the record, a mandamus proceeding which went to hearing, and four petitions for writs of habeas corpus. In his fifth petition for a writ of habeas corpus, he alleged the knowing use of perjured testimony by Government officials. A hearing was had which lasted for eight days and at which the testimony or depositions of 20 witnesses were produced. At the end, the court found that his allegations of conspiracy to use perjured testimony were not sustained; that on the contrary—

> * * * petitioner's suppositions in this regard are nothing more than fantasy of a crass variety and entirely without support of credible evidence.

Granted that the courts, in the interest of preserving the privilege of the writ, cannot escape from being required to hold hearings caused by the "fantasy of a crass variety" of imaginative prisoners, must their time be taken up with extended hearings every time that crass fantasy takes a new turn? If a petitioner has once been proved to be a gross perjurer, must his every allegation be accepted as true?

Here, as we have shown, every "fact" now relied upon was known before the jury convicted petitioner. The differences between the facts brought out by petitioner's counsel at the trial during his cross-examination of the witness Donner (*supra*, pp. 7–10) and petitioner's present assertions in his brief (R. 55) are perhaps only the product of nostalgic improvement over a period of eight years, though assuredly petitioner's credibility is not enhanced by the circumstance that, as he himself admitted under oath, he had, prior to his present conviction, been convicted of felonies in West Virginia, Texas, Indiana, and of a violation of the Dyer Act in an unspecified federal court (R. 63, 80, No. 607, Oct. T. 1944). All that has really been added here, apart from some slight embroidery, is a headnote—and that, as we have already pointed out above, pp. 50–53, is insufficient.

Nor are we obliged here to speculate as to the truth or untruth or inherent probability of either the embroidery or of the new headnote. The portion of the record of trial included in the pleadings in the first petition for habeas corpus shows, not only that what petitioner has now conjured up did not in fact happen, but also that the lawyer who represented him in connection with that first petition found no substance in the notion and so did not press it. In these circumstances, clearly, petitioner's present allegations

do not raise any issue of fact which needs to be tried.

A court has not only the right, it has the duty to lay down reasonable requirements designed to assure itself that one who invokes the great remedial writ of habeas corpus does so in good faith, and not, as here, simply in the course of making a reckless assertion. To that end, it may, we think, as the decision below suggests, require that in subsequent petitions for the writ, an applicant set forth the fact that he has made previous applications and give some explanation of his failure to urge the new grounds in his earlier petition. As this Court said in *Salinger* v. *Loisel*, 265 U. S. 224, 232:

> * * * As a further safeguard against abuse the court, if not otherwise informed, may on receiving an application for the writ require the applicant to show whether he has made a prior application and, if so, what action was had on it.

The dissenting opinions below urge that petitioner may not have learned of the prosecutor's alleged implication in the perjury until after the denial of the earlier petitions. The earlier records show that such is not the case here. But if it were, then petitioner would have no difficulty in so stating, and nothing in the majority opinion would require or encourage a district court to deny the writ, if such were the fact. All that the majority opinion requires is that, in subsequent

petitions for the writ, the petitioner set forth enough so that the judge to whom the petition is presented may have some basis for determining whether the new petition is invoking the aid of the courts on some genuine ground theretofore not urged for some good reason, be it lack of knowledge of the facts or of the law. The majority opinion does not bar relief to a person who can show that, even though he knew the facts earlier, he did not understand their significance, and therefore did not urge them. It does not bar relief where a prior decision is shown to have been wrong. As we read the majority opinion below, it does no more than require an applicant for successive writs of habeas corpus to show that he has not deliberately, in bad faith, held back information known at the time of the prior proceeding. It does not prevent resort to the writ, it merely requires a showing of good faith. That, we submit, is reasonable judicial administration which in no way curtails the privilege of the writ.

D. THE ABUSIVE USE OF SUCCESSIVE PETITIONS FOR WRITS OF HABEAS CORPUS HAS BECOME A SERIOUS PROBLEM IN JUDICIAL ADMINISTRATION

The present case involves a serious problem in judicial administration which extends far beyond the particular facts here presented. Essentially, that problem is how to preserve the function of the writ of habeas corpus as the great instrument of right and freedom and yet to protect the courts

from being harassed with swarms of unmeritorious and frivolous petitions which not only burden them to no avail but which may indefinitely delay the due administration of the laws of the land.

The abusive use which can and has been made of the writ of habeas corpus has become the subject of increasing concern to courts and judges. What petitioner characterizes as "the bugaboo of a flood of petitions for writs of habeas corpus" (Pet. Br. 24), has in fact been a matter for the attention of the Judicial Conference at six successive meetings. *Report of the Judicial Conference,* 1943, pp. 22–24; *id.,* 1944, p. 22; *id.,* 1945, p. 28; *id.,* 1946, p. 21; *id.,* April 1947, p. 46; *id.* Sept. 1947, pp. 17–18.* The specific difficulties arising in particular jurisdictions are documented, with respect to the situation obtaining at Alcatraz, not only in the decision below (R. 57) but also in a recent address by Judge Goodman of the Northern District of California, *Use and Abuse of the Writ of Habeas Corpus,* 7 F. R. D. 313. Similar problems in the District of Columbia were the subject of exhaustive treatment by the Court of Appeals in *Dorsey* v. *Gill,*

* It may be noted that draft Section 2244 of the Judicial Conference's most recent proposal (Sept. 1947 *Report,* p. 18), is simply a restatement of the rule, discussed above at pp. 30–40, that on a second or later application for habeas corpus a federal judge may give controlling weight to a prior denial on the same grounds.

148 F. 2d 857 (App. D. C.), certiorari denied, 325 U. S. 890.

We set out below, pp. 66–69, some of the statistics set out in that decision and Judge Goodman's address which illustrate the extent of the problem. And, with the aid of the United States Attorneys in the districts involved, we have undertaken to supplement those figures with statistics in regard to habeas corpus petitions in three districts where important federal penitentiaries are located—the Northern District of Georgia, embracing Atlanta Penitentiary, the District of Kansas, covering Leavenworth Penitentiary, and the Northern District of California, where Alcatraz is situated.

Atlanta Penitentiary has an average prison population of about 2,000. The United States Attorney has sent us the following figures in regard to habeas corpus petitions in that district:

Atlanta

Year	Number of petitions filed	Number of hearings *	Number of discharges
1937	205	149	32
1938	123	111	9
1939	63	55	3
1940	75	66	6
1941	65	59	7
1942	103	97	10
1943	139	137	9
1944	114	112	6
1945	96	96	2
1946	52	52	0
Total	1,035	994	84

* It has been proved impossible to distinguish between hearings on orders to show cause and hearings on the writ since, in many instances, witnesses are heard on orders to show cause and legal questions alone are determined on hearings after the writ has issued.

For Leavenworth, which has an average prison population of approximately 2,000, the figures are as follows:

Leavenworth

Year	Number of petitions filed	Number of hearings	Number of discharges
1938	44	42	2
1939	51	49	2
1940	57	56	
1941	64	59	3
1942	45	42	3
1943	64	57	5
1944	46	40	
1945	39	30	3
1946	46	43	1
1947 (to Ju 30)	53	47	3
Total	509	466	21

From Alcatraz, with an average prison population of only approximately 250, there are almost as many petitions as from the much larger penitentiary at Leavenworth. The figures for that prison are as follows:

Alcatraz

Year	Number of petitions filed	Number of discharges *
1937	14	
1938	29	
1939	74	2
1940	27	2
1941	35	1
1942	29	3
1943	40	4
1944	31	1
1945	36	1
1946	27	
1947	36	
Total	368	14

* We do not have the figures as to the number of cases which went to hearing, partly because in this district, before the decision of this Court in *Holiday* v. *Johnston*, 313 U. S. 342, hearings were held before a Commissioner rather than before the court.

These figures reveal that, although the majority of petitions contain allegations which require some form of hearing, more than 95 percent of the petitions filed prove on examination to be without merit.[1] Yet many of the cases involve lengthy hearings which require the testimony or depositions of judges, United States Attorneys, and court clerks, often miles away from the place of hearing.

Nor is that the end of the problem. More vexing than the flood of frivolous petitions is the practice of many prisoners of filing successive petitions setting up *seriatim* various attacks on the judgment of conviction. From Atlanta during the past 10 years, 36 petitioners filed 2 petitions, 9 filed 3, 2 filed 4. Out of Leavenworth, 39 petitioners filed 2 petitions, 11 filed 3, 2 filed 4, 1 filed 5, and 1 filed 7. In Alcatraz, understandably enough perhaps, prisoners have been even more diligent. Judge Goodman reports (*Use and abuse of the Writ of Habeas Corpus*, 7 F. R. D. 313, 315):

> The most common abuse in this district is the filing of successive petitions by inmates of Alcatraz Prison. During the past ten years, 180 Alcatraz inmates filed 368

[1] The situation is not substantially changed by appellate review. The United States Attorneys inform us that appeals by petitioners are seldom successful, and that in the years from 1938 to the present, not more than two appeals a year by petitioners in each district resulted in reversals, and that in many years no reversals have been obtained by petitioners.

petitions for the writ in our court, which would, at first blush, appear to be an average of about two petitions to one inmate. But that is not the real picture. 117 inmates filed one petition each. The remaining 63 filed 251 petitions. And when we break down these figures, we find that 26 inmates filed 167 petitions. And a further analysis discloses that one inmate filed 16 successive petitions, one man filed 15 successive petitions, one filed 14 petitions, one filed 9 petitions, etc. A complete tabulation is set out in the margin.* Most of the recent Supreme Court pronouncements arise out of these petitions.

*[Footnote from original.] Alcatraz habeas corpus petitions filed from Jan. 1, 1937 to June 18, 1947.

Number of petitioners	Number of petitions filed	Total number of petitions filed
1	16	16
1	15	15
1	14	14
1	9	9
2	7	14
5	6	30
9	5	45
6	4	24
10	3	30
27	2	54
117	1	117
180	----------	368

Even more persistent litigants have appeared in other circuits. In *Slaughter* v. *Wright*, 135 F. 2d 613 (C. C. A. 4), the court had before it a prisoner who had filed 18 prior applications for a writ. As reported in *Dorsey* v. *Gill*, 148

F. 2d 857, *supra*, one person in the District Court filed 50 petitions, and four others more than 20 each. And the Court of Appeals pointed out (148 F. 2d at 862–863):

> Today, in the District of Columbia, * * *, petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24, a fourth 22, a fifth 20. One hundred nineteen persons have presented 597 petitions—an average of 5. The extent of the problem is indicated by the table appended in the margin, which shows a growth of filings in the District Court from 32 in the fiscal year 1934 to 276 in 1944; and 101 petitions filed during the first four months of the fiscal year 1945 (July to October, inclusive, 1944). Moreover, it should be noted that the total of 635 petitions filed between July 1941 and October 1944, inclusive, does not include 180 petitions presented, but denied filing. The number has increased most rapidly during the last three years, since the Supreme Court's decision in Walker v. Johnston [312 U. S.

275], and since one of the opinions filed in this Court in the Rosier case [133 F. 2d 316], admonished the District Court that: "Administrative inconvenience, even occasional abuse of the facilities of the courts, is but a small price to pay for the precious right of access to the courts guaranteed under our system of government *to all who claim to be wronged.* [Italics supplied.] Thus, if all petitions presented during this period of three and one-third years had been filed and writs issued, as is the practice in some districts, the judges of the District Court would have been required to hold 815 hearings upon returns made, in each instance, by the custodial officers in whose control these persons were held.

Perhaps the most flagrant instance of an abusive use of the writ of habeas corpus is that of Gene McCann, who, after conviction, filed almost a thousand applications in the District Court for the Southern District of New York, and delayed entering upon service of his sentence for five years after his conviction. See Memorandum for Respondent in *McCann* v. *Clark,* 331 U. S. 813 (No. 340, Oct. T. 1946).

With respect to persons who have commenced service of prison sentences, even the filing of numerous successive petitions for the writ may not in and of itself have the effect of defeating the administration of justice, although it is not unknown for prisoners to use the opportunity of

their appearance in court on a writ of habeas corpus to attempt an escape. E. g., *Bayless* v. *United States,* 141 F. 2d 578 (C. C. A. 9), certiorari denied, 322 U. S. 748. In other situations, however, an unrestricted, repetitious use of the writ may result in postponement for long periods of the operation of the will of Congress and the mandate of the courts. A striking example of this result is found in deportation cases, where, in numerous instances, aliens found deportable in accordance with established procedure have for years delayed execution of the deportation orders by successive legal actions. For example, a group of enemy aliens were, after hearing, ordered removed by individual orders issued in the period from October 1945 to April 1946. The constitutionality of the Alien Enemy Act, under which the deportation orders were issued, was sustained by the Court of Appeals on May 6, 1946, *Citizens Protective League* v. *Clark,* 155 F. 2d 290 (App. D. C.), and certiorari was denied by this Court on December 9, 1946, 329 U. S. 787. In December 1947, two years after some of the orders had been issued, many of those persons are still in this country, having in the meantime filed a new injunction proceeding and two successive petitions for writs of habeas corpus. See Memorandum in Opposition to Petitioners' Application for a Stay in *Ahrens* v. *Clark,* No. 446, this Term. See also

Wong Doo v. *United States*, 265 U. S. 239, 241, where this Court noted that the alien had succeeded in delaying his deportation for four years.

It is evident, therefore, that the courts as a whole, and particularly the courts in districts in which large federal penitentiaries are located, are confronted with a serious problem arising from an abusive use of the writ of habeas corpus by unscrupulous prisoners.[8] If an attempt to curb that abuse would result in any substantial curtailment of the great privilege of the writ, it would be easy to agree with the statement in *Ex parte Rosier*, 133 F. 2d 316, 332 (App. D. C.), that

> Administrative inconvenience, even occasional abuse of the facilities of the courts, is but a small price to pay for the precious right of access to the courts guaranteed under our system of government to all who claim to be wronged.

But generalized exhortations do not settle concrete problems of where to draw a line. We think the controlling considerations were more realistically set forth in Mr. Justice Rutledge's dissent in the *Rosier* case, where he said (133 F. 2d at 333):

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[8] "We also receive from Alcatraz inmates many and successive applications for the writ praying us to require the Warden to allow petitioners to receive newspapers, to send for law books, to circularize Congressmen, to keep birds, to change lavatory facilities, to cease censoring prisoner's correspondence and many others too numerous to mention." Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F. R. D. 313, 316.

> Individual freedom, of course, is paramount to mere administrative convenience, expediency and efficiency in operation of the courts and other governmental agencies. Habeas corpus is the historic instrument for preserving it. But adequate protection does not require a litigious capacity of such nuisance value that hearings must be had repeatedly upon the same issue in the petitioner's uncontrolled and unlimited choice. There must be some limit to the frequency with which he can force the court to determine and redetermine his sanity. I think therefore that the controlling issues in the case are, What is that limit? Has it been exceeded on these facts?

That the limit had been exceeded is shown by the circumstance that the *Rosier* decision was soon specifically overruled in *Dorsey* v. *Gill*, 148 F. 2d 857, 864, *supra*. Thus the Court of Appeals held that the abuse may be curbed without substantial infringement of the privilege of the writ.

The method of correction is, in the normal case of a repeated application, a fairly summary disposition on the basis of the prior adjudication. That has been the method traditionally used, see pp. 30–40), *supra*, by judges whose regard for liberty was not less because they evidenced sufficient fortitude to refuse to act "the puppet of any pertinacious convict." And, where a genuinely new ground is asserted in a later application, then the method of correction is that suggested by the opin-

ion below, viz., that the applicant who repeatedly invokes the writ must, by way of earnest of good faith, show either a change of circumstances or some reason why the matters alleged could not previously have been presented.

There is no deprivation of liberty or constitutional right in such rulings.

II

PETITIONER WAS NOT ENTITLED AS OF RIGHT TO BE BROUGHT BEFORE THE CIRCUIT COURT OF APPEALS TO ARGUE HIS APPEAL

As we have indicated in the Statement, *supra*, pp. 16–17, petitioner moved in the circuit court of appeals for an order directing the warden to produce him before that court in order to enable him to argue his appeal (R. 42–43). A majority of the court below were of the opinion that the court was without power to grant the motion (R. 44–48). Judge Stephens expressed the view that the power existed but that the motion should be denied as a matter of discretion (R. 48), and Judges Denman and Orr dissented from the holding that no power existed without reaching the question of the propriety of exercising such power (R. 48–52). After certiorari was granted, petitioner moved this Court for the appointment of counsel to represent at the hearing, and counsel was duly appointed.

We think the court below correctly interpreted the "all writs" provision of Section 262 of the

Judicial Code (*supra*, p. 3) as denying the existence of any power to issue an order for the production of a prisoner to enable him to argue his appeal in person. While the word "necessary" in that Section is not to be restricted "in the sense that the court could not otherwise physically discharge its appellate duties" (*Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 273), the provision concludes with the phrase, "agreeable to the usages and principles of law." And the issuance of a writ of habeas corpus to produce a prisoner to enable him to argue his appeal is, as the court below rightly held, not "agreeable to the usages and principles of law" (R. 46–47).

It is not contended here, nor could it be, that a writ of habeas corpus for this purpose was known to the common law. See *Ex parte Bollman*, 4 Cranch 74, 95–96; 3 Bl. Comm. *129–132. And it is significant that in England, in the course of the Nineteenth Century, the courts held that they had no power to grant a habeas corpus to bring up a party in custody to enable him to conduct his causes in person. The earlier decisions reflect some uncertainty as to whether the denial was properly based upon a lack of power (*Attorney General* v. *Hunt*, 9 Price 147; *Ford* v. *Nassau*, 9 M. & W. 793) or upon discretionary grounds (*Ex parte Cobbett*, 3 H. & N. 155; *Clark* v. *Smith*, 3 C. B. 982). Later, however, in *Benns* v. *Mosley*, 2 C. B. N. S. 116, where the judges of the Court

of Common Pleas conferred with the judges of the Courts of Queen's Bench and Exchequer before delivering judgment, all concurred in saying that "we have no power to do that which is asked" (2 C. B. N. S. at 116). That has been the law of England ever since (*Weldon* v. *Neal*, 15 Q. B. D. 471), and neither petitioner nor the dissenting judges below cite any American cases to the contrary. What was said in *Schwab* v. *Berggren*, 143 U. S. 442, 449, does not rise above the dignity of *obiter*, if indeed it is in point in this connection.

In those circumstances we think the court below was right in saying that to permit petitioner to appear in person would be to "substitute whim for necessity" (R. 46), and that it would also require the court "to invent for the occasion a species of the writ unknown to the 'usages and principles of law'" (R. 46).

Indeed, even if it could be assumed *arguendo* that a court possessed the power—the naked power—to order a prisoner before it for the argument of his own appeal, the mere existence of such power by no means would require that the order should have been made in the present case. It is clear that a petitioner who is represented by an attorney would not as a matter of law be entitled to be brought before the court. It is also clear that a person who is free from custody would, if he chose to appear without counsel, be free to argue his own cause before the circuit

court of appeals pursuant to the authority granted by Section 272 of the Judicial Code (*supra,* p. 3) to "plead and manage their own causes personally" and pursuant to the rules of the court which normally grant the right to oral argument. The question, therefore, is whether the statutory right to manage one's own cause goes so far as to require a circuit court of appeals to exercise its power to bring before it a prisoner who, because of his conviction, is not free to come and go as he pleases and therefore cannot independently come before the court.

We think the statutory right given to parties to "plead and manage their own causes personally" does not extend that far. The right to present oral argument before an appellate court is not an essential element of due process; important decisions are made by this and other courts without oral argument of any kind. Thus, motions to dismiss or affirm have traditionally been disposed of in this Court without argument. See *Carey* v. *Houston & Texas Cent. Ry.,* 150 U. S. 170, 179. The same is true of petitions for certiorari; oral arguments on such applications are a rarity. E. g., *In re Yamashita,* 327 U. S. 1. Nor is oral argument essential to enable an appellate court to decide questions which must be determined upon the record before it. See *Schwab* v. *Berggren,* 143 U. S. 442. The right granted by Section 272 of the Judicial Code is fulfilled by allowing an appellant, if he so desires,

to take his own appeal and prepare his own briefs. We think the court below was correct in holding that neither the statute nor rules of court were intended to insure a party "against external happenings which may circumscribe the right or interfere with its exercise" and that the inability to appear before a court is merely one of the deprivations that are "an inevitable and intended consequence of conviction for crime" (R. 46).

Any other conclusion would lead to absurd results. If the statute required a court to use its process to compel the production of every prisoner who chose to bring any form of legal proceeding in which oral argument is customarily allowed, prisoners could by the simple device of dispensing with an attorney compel the Government frequently to transport them across the continent. As the court below said (R. 48),

> Thus this spurious variant in the field of habeas corpus would outrank in urgency the great constitutional writ itself. One need not be a prophet to foresee the widespread abuse of the writ that would ensue, not to mention the items of fruitless burden and expense. To the legitimate hope of release by legal means would be added inducements not so legitimate; for temporary relief from prison confinement is always an alluring prospect, and to the hardened criminal the possibility of escape lurks in every excursion beyond prison walls.

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This very case presents an arresting example. Petitioner, confined in the Northern District of California, was convicted in the Eastern District of Michigan. If his contention under the present heading is sound, then, if he made a motion in the convicting court, he would be entitled as of right to be brought from Alcatraz to Michigan. In this very proceeding, if he chose not to accept the lawyer who was appointed for him by this Court, petitioner could insist that he be himself transported—at public expense, since the present proceeding is *in forma pauperis* (R. 67)—from Alcatraz to Washington, to argue his own case. It may well be, of course, that by his motion in this Court for the appointment of counsel (*supra*, p. 19), petitioner has abandoned his contention that his personal presence is "necessary" (Judicial Code, § 262) in this case.

We deem it proper to point out that, so far as the right of personal appearance is concerned, petitioner's brief here is hopelessly inconsistent with itself. On the one hand, it is argued that his successive habeas corpus proceedings, at two of which he was represented by counsel in the district court, must be treated with that deferential tenderness which, it is contended, the law accords the lay litigant. Petitioner's brief is full of references to "his inarticulate and legally imprecise manner" (Pet. Br. 15), to "an effort, however legally feeble" (Pet. Br. 16) to "petitioner's efforts, however imperfect" (Pet. Br.

17); and it is urged with some fervor (Pet. Br. 17) that "standards of technical pleading would hardly seem applicable when liberty and justice are the stakes." Then, on the other hand, it is argued that petitioner is entitled as of right to be taken to the appellate courtroom from his place of confinement—and if his principle is sound, it makes no difference what distance separates the two places, whether it be across the bay or across an entire continent—there to inflict upon the court these same "inarticulate and legally imprecise" contentions. It seems to us manifest that the right given by Section 272 to manage one's own cause does not require the courts to undertake such grotesque and essentially futile operations.

A prisoner who decides to dispense with an attorney obtains the advantages of an appeal by being allowed to take his appeal and file his own briefs. He is not substantially hampered in the prosecution of his cause by being unable to argue that cause personally. As the majority of the court below points out (R. 47), it is the practice, not only in that court, but in most circuit courts of appeal, to appoint counsel for an appellant acting without counsel in cases where oral argument is deemed of assistance in reaching a decision. Such a practice is, in practical effect, of infinitely greater assistance to an indigent appellant than would be the indiscriminate use

of a power to bring an incarcerated layman before it.

If the question whether a prisoner appealing in person should be brought before the court to argue his own appeal is a matter for the exercise of judicial discretion, as the Circuit Court of Appeals for the Fifth Circuit held in *Goldsmith* v. *Sanford,* 132 F. 2d 126, 127, certiorari denied, 318 U. S. 762, then here there was clearly no abuse of discretion in failing to order petitioner's production. The questions involved on his appeal, insofar as they involved matters of law, were not of the kind as to which a layman's arguments would be of significance; and petitioner had already demonstrated by his previous applications that he lacked the capacity to be of any particular helpfulness to an appellate court. Moreover, petitioner was confined in a penitentiary set aside for the incarceration of "habitual criminals and desperate and unregenerate long-term prisoners" (Rep. Atty. Gen., 1937, p. 150), and the court below was clearly justified in taking into consideration the potentialities of escape and the expense to the public of requiring production of prisoners under guard.

It would, we submit, be difficult to imagine any situation in which the presence of a lay prisoner to argue his appeal in person could be deemed so necessary for the doing of distributive justice as to warrant his production in court under

guard. And, quite obviously, no such situation was presented here.

CONCLUSION

The decision under review is correct. It reflects a reaffirmation of sound principles of law, and accords with wise policies of judicial administration. The judgment of the court below should therefore be affirmed.

Respectfully submitted.

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DECEMBER 1947.

APPENDIX

In the District Court of the United States for the District of Kansas, First Division

No. 988 H. C.

EDWARD CASEBEER, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, RESPONDENT

Order discharging writ of habeas corpus

Edward Casebeer, hereinafter called the petitioner, was convicted in the United States District Court for the District of Kansas under an indictment filed September 28, 1935, in criminal case No. 6209. The indictment charged a robbery of the First National Bank of Smith Center, Kansas, committed on February 1, 1935. It alleged that the petitioner and two co-defendants (not apprehended or tried) robbed the bank with force and violence, in which kidnapping of certain officials was incident to the crime. Petitioner denied his guilt and was subsequently placed on trial before the Honorable Richard J. Hopkins, District Judge. In a jury trial, at which he was represented by employed counsel, a verdict of guilty was returned on December 7, 1935. Timely motions for a new trial and for arrest of judgment were filed by the petitioner, the hearing of which was continued by the court at his request until

April 13, 1936, at which time the Court overruled the motions and entered judgment. Petitioner was sentenced to twenty years' imprisonment in the Leavenworth penitentiary and promptly filed his notice of appeal. On January 16, 1937, the United States Circuit Court of Appeals; Tenth Circuit, affirmed, the opinion being reported at 87 F. 2d 668.

After entering on service of his sentence, petitioner challenged validity of the conviction by a writ of habeas corpus in this court, same being No. 538 H. C. Said action was heard by the Honorable Orie L. Phillips, Circuit Judge, assigned as a special judge to hear the cause. Petitioner was permitted to proceed in forma pauperis and a full hearing was had, following which the writ was discharged and the petitioner remanded to custody. An appeal was taken to the Circuit Court, and on review, in an opinion reported at 114 F. 2d 789, the ruling of Judge Phillips was affirmed.

Petitioner then applied for a writ of certiorari to the Supreme Court, which court, without opinion, reversed the judgment of the Circuit Court and remanded the cause with directions to consider the appeal in the light of a transcript of the testimony taken at the hearing before Judge Phillips on the petition for the writ (*Casebeer* v. *Hudspeth, Warden,* 312 U. S. 662).

The appellate court, following mandate of the Supreme Court, then considered petitioner's appeal in the light of the transcript. It obtained the record of the habeas corpus hearing on which the cause had been submitted. In addition, the petitioner requested a transcript of the hearings

on a supplemental motion for a new trial in the criminal case. That transcript was also prepared and filed with the appellate court, which was considered, as directed by the Supreme Court, in the light of the transcript of the testimony adduced at the habeas corpus hearing. The Circuit Court again affirmed (121 F. 2d 914). Petitioner again applied for certiorari to the Supreme Court, but the same was denied (*Casebeer* v. *Hudspeth, Warden,* 316 U. S. 681).

In November 1941, petitioner filed a motion in his criminal case to correct the record, which motion was considered by Judge Phillips on December 31, 1941, and denied.

In June 1942, petitioner filed a motion to vacate the judgment and sentence in his criminal case, No. 6209, requesting a hearing, and the production witnesses and records. This motion was heard by Trial Judge Hopkins and denied on July 9, 1942. Petitioner then filed a motion to set aside Judge Hopkins' order of July 9 and requested that another judge be appointed to hear the cause. Upon the filing of this motion, the Honorable Bower Broaddus, United States District Judge for the Eastern, Northern, and Western Districts of Oklahoma, was assigned to hear the matter. On a hearing at Topeka, Kansas, September 25, 1942, the petitioner being represented by counsel also appeared personally and testified. The cause was taken under advisement. Briefs were filed and findings of fact and conclusions of law were made. On February 13, 1943, Judge Broaddus likewise overruled petitioner's motion to correct the record.

On March 29, 1943, petitioner presented an application for leave to file a writ of mandamus or an equivalent order and prosecute the same in forma pauperis, accompanied by an affidavit to disqualify Judge Hopkins. Said application was thereupon considered by the Honorable Royce H. Savage, United States District Judge for the Northern District of Oklahoma, and on March 29, 1943, denied.

Thereupon, petitioner filed a second application for writ of habeas corpus, No. 826 H. C. Said cause was heard by the Honorable Walter A. Huxman, Circuit Judge, assigned to hear said action. Following a hearing, in an opinion filed June 18, 1943, the writ was discharged and petitioner again remanded to custody.

On September 4, 1943, a third habeas corpus petition, No. 852, was filed. A writ was issued, counsel appointed for petitioner, and on October 13, 1943, said cause was dismissed by Judge Huxman for lack of merit.

On April 20, 1944, petitioner's fourth habeas corpus petition, No. 878, was lodged with the court. Thereafter, at Leavenworth, Kansas, and on October 16, 1944, petitioner again appeared before Judge Huxman pursuant to writ of habaes corpus, and said cause was dismissed by the court. The Court, in entering a dismissal, introduced for the benefit of petitioner, as a part of the record in said cause No. 878, the entire record in No. 826 H. C. and 852 H. C. and authorized petitioner to appeal to the Circuit Court in forma pauperis. From the above orders and rulings of Judge Huxman, no appeal was taken.

On September 13, 1946, petitioner instituted a mandamus action, No. 6016, accompanied by an affidavit of bias and prejudice against Judge Huxman, requesting the Court to issue orders to the present clerk and a former clerk of the Court to show cause why they had not performed their official duties. Petitioner charged that certain documents in his criminal case had been falsified; that a transcript of testimony of a Federal Bureau of Investigation Agent was deleted in part; that in connection with his motion for new trial he had filed more than twenty affidavits, whereas the record shows but three; that several important affidavits of the petitioner were missing, and two had been added by the office of the United States Attorney, and none of those submitted by the petitioner had filing dates. Petitioner further charged that a former United States Attorney was permitted, by a former clerk of this court, to remove from the files a certain affidavit made by a witness for the petitioner and to substitute one of his own in its place. Various other direct and indirect charges, including conspiracy on the part of Government officials, the furnishing of false transcripts of testimony to defraud petitioner of proof of what had occurred in his trial, and suppression of evidence to prove his former habeas corpus cases were alleged by petitioner. An alternative writ of mandamus was issued and the cause set for hearing by order of the Court before the Honorable J. Foster Symes, United States District Judge for the District of Colorado.

On a full hearing October 1, 1946, Judge Symes, finding petitioner's claims and contentions to be

without substance, discharged the alternative writ of mandamus and dismissed the action.

The instant habeas corpus proceeding, No. 988 H. C., was filed on October 9, 1946. It was alleged that petitioner's conviction had been brought about as a direct result of fraud, perjury and conspiracy; that a conspiracy existed between Wint Smith, former head of the Kansas Highway Patrol, S. S. Alexander, former United States Attorney, and Lawrence J. Richardson, former official court reporter. Petitioner charged under oath that as a result of said conspiracy public officials had committed the crime of perjury in his criminal case. An indirect charge was made that the Federal Bureau of Investigation knew of the perjury; that fraud after fraud had been perpetrated upon the trial court, the upper courts, the office of the pardon attorney and the Attorney General of the United States to prevent petitioner having a fair or impartial hearing before the courts or before the pardon attorney. In various motions and supplements to petitioner's application, he reiterated that his conviction was void because of conspiracy between public officials and the knowing use of perjured evidence by prosecuting authorities.

It was contended that as an incident to his conviction, allegedly gained by fraud, conspiracy and perjury of the former head of the Kansas State Highway Patrol, that a former clerk of this court had one of petitioner's attorneys prepare and sign a phony letter and place it in petitioner's criminal case to cover up certain missing affidavits of which both had knowledge; that the former head of the Kansas State Highway Patrol,

through influence of a so-called political machine, completely dominated all the officers of the United States court for the District of Kansas at the time of petitioner's trial. It was alleged that respondent's attorney had knowledge that petitioner's conviction was the result of conspiracy, fraud and perjured testimony, knowingly used by prosecuting authorities.

At the request of petitioner, the Court, at government expense, caused process to be issued for the production of many witnesses whose evidence, it was contended by the petitioner, would prove the charges made in this action. Repeated hearings were accorded petitioner and full opportunity was afforded him to produce, through depositions as well as personal attendance of witnesses, any evidence to sustain his charges of irregularities in the criminal case.

The petitioner was brought before the court on successive writs of habeas corpus on November 17 and December 23, 1946; on January 31, March 7, May 9, June 4, and July 2 and 3, 1947. Witnesses at petitioner's various hearings who were interrogated and testified at his behest included the following:

S. S. Alexander, former United States Attorney for Kansas.

Wint Smith, former head of the Kansas State Highway Patrol.

Lawrence J. Richardson, former Federal Court Reporter.

D. C. Hill, former Assistant United States Attorney.

T. V. Melvin, Special Agent, Federal Bureau of Investigation.

A. S. Reeser, Special Agent, Federal Bureau of Investigation.

Frank Flack, former United States Commissioner.

Clyde Schenck, petitioner's counsel at Commissioner's hearing.

Edward M. Boddington, original court appointed counsel.

Joseph H. Brady, petitioner's counsel in criminal case.

Nona E. Snyder, associate counsel for petitioner in criminal case.

Michael D. Konomos, attorney employed by petitioner concerning motion for new trial.

Edna Wing, Secretary to attorney Michael D. Konomos.

Ernest Verhuel, inmate Federal Penitentiary.

Carl. F. Zarter, Record Clerk, Federal Penitentiary.

Harry M. Washington, Clerk, United States District Court.

Howard F. McCue, former Clerk, United States District Court.

A. D. Weiskirch, petitioner's attorney on appeal of criminal case.

Robert Lindsay, former Federal Probation Officer.

Dean F. Rogers, former Sheriff, Shawnee County, Kansas.

Randolph Carpenter, United States Attorney for Kansas.

After conclusion of the hearing of July 3, 1947, petitioner offered in evidence depositions taken in this cause in Milwaukee, Wisconsin, on January 27 and May 21, 1947, and having announced that he had no further evidence to offer, said cause was submitted to the court and taken under advisement.

The Court, on consideration of the files and

records in petitioner's criminal and former habeas corpus actions, and the evidence adduced in this cause, finds all the issues in favor of the respondent and against the petitioner. The Court finds:

Findings of fact

That petitioner has not sustained the burden of proof required of him to establish that a conspiracy existed among public officials to convict him or that perjured evidence was knowingly used or improper practices engaged in by such officials in petitioner's criminal case. On the contrary, the Court finds that petitioner's suppositions in this regard are nothing more than fantasy of a crass variety and entirely without support of credible evidence.

In the light of the record as a whole, after what it believes has been a meticulous examination of the redundant, if not frivolous proposals offered by petitioner, this Court is constrained to now hold that the petitioner's conviction is clothed with unassailable validity.

Conclusions of law

A judgment and sentence in a criminal case bears the presumption of validity.[1]

The United States District Court for the District of Kansas had jurisdiction of the offense with which petitioner was charged, tried and convicted and over the person of the petitioner.[2]

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[1] *Johnson* v. *Zerbst*, 304 U. S. 458; *Macomber* v. *Hudspeth*, 115 F. 2d 114.

[2] *Casebeer* v. *United States*, 87 F. 2d 668.

In a habeas corpus proceeding, the Court is concerned only whether the petitioner was convicted in a court having jurisdiction of the offense and of the petitioner, and whether the sentence imposed was authorized by statute.[3]

That the sentence imposed against the petitioner was within the discretion of the trial court; that the same was authorized by statute, and was not excessive or unusual punishment.[4]

Sufficiency of proof to sustain a charge upon which a conviction has been obtained cannot be tested on habeas corpus.[5]

A writ of habeas corpus may not be used as a substitute for an appeal.[6]

To justify habeas corpus on the ground that a petitioner was denied constitutional right to a fair trial, an extreme case must be disclosed and it must be shown that the proceedings resulting in his conviction were a farce and mockery of justice.[7]

A collateral attack on a judgment may be sustained only when objections to it are such as to render it not merely erroneous, but void. Perjury does not ordinarily render a judgment void. A judgment cannot be set aside in a collateral proceeding on the ground of perjury unless false testimony is so entwined with other circumstances as to deprive the proceeding of its character as due process of law.[8]

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[3] *Moore* v. *Aderhold*, 108 F. 2d 729.
[4] *Schultz* v. *Zerbst*, 73 F. 2d 668.
[5] *Casebeer* v. *Hudspeth*, 121 F. 2d 914.
[6] *Glascow* v. *Moyer*, 225 U. S. 420.
[7] *Diggs* v. *Welch*, 148 F. 2d 667.
[8] *Hodge* v. *Huff*, 140 F. 2d 686.

In Federal Courts a discharge through habeas corpus of a prisoner confined under a judgment of conviction is granted only in the exercise of a sound judicial discretion. The remedy is an extraordinary one, out of the usual course, and involves a collateral attack on the judgment constituting the basis of the detention. The instances in which the writ is granted are exceptional and must of necessity be confined to situations where there is a peculiar and pressing need for it or where the judgment under which a prisoner is retrained is wholly void.[1]

In the judgment of this Court, the proof offered by the petitioner falls far short of measuring up to the tests required for vitiating the solemn judgment of a court of competent jurisdiction.

It is, therefore, by the court, considered, ordered, adjudged and decreed that Edward Casebeer, the petitioner in this cause, is in the lawful, legal custody and control of the Warden of the United States Penitentiary at Leavenworth, Kansas, and he is therefore remanded to the continued custody and control of the Warden until service of the sentence heretofore imposed in Criminal case No. 6209 of this Court is completed or until the petitioner is discharged as by law provided.

[S] Arthur J. Mellott,
ARTHUR J. MELLOTT, *Judge.*

Dated at Kansas City, Kansas, this 24 day of July 1947.

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[1] *Goto* v. *Lane*, 265 U. S. 393.

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